IN THE SUPREME COURT OF FLORIDA

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**CASE NO. 84,543**

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YARDARM RESTAURANT, INC.

Petitioner,

vs.

CITY OF POMPANO BEACH

Respondent.

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APPEAL FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA
(FIFTH DISTRICT SITTING BY DESIGNATION)

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# PETITIONER'S BRIEF ON JURISDICTION

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[Listing of Attorneys, Table of Contents, and Table of Citations omitted in printing.]

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## STATEMENT OF THE CASE AND THE FACTS

In 1959, the Stephanis brothers opened the Yardarm Restaurant on land overlooking the Hillsboro Inlet and a lighthouse. The restaurant was one of Florida's 10 best and busiest. In 1972, Yardarm decided to turn the property into a European style grand hotel. Finding no

legal restrictions whatsoever blocking this project, Yardarm's preliminary hotel plans were approved.

Although Yardarm had the clear legal right to build its hotel a few politically influential citizens complained, fearing that the project would block their view of the lighthouse. Bowing to political pressure, public officials vowed the project would never be built. Thus began what the appellate court opinion labels as the "sorry saga" of the Yardarm.

Yardarm received its first building permit on February 14, 1974. Four days later the permit was illegally revoked. Three years later, in 1977, after two circuit court decisions and one appellate decision the City was ordered to reissue the permit under the same terms and conditions as existed in 1974.

Upon reissuance of its permit Yardarm demolished its restaurant and began construction in earnest. However, unlike 1974, the reissued permit did not include the docks and quays which were an integral part of both the physical and financial structure of the project. The City refused to issue the dock permit and Yardarm was forced back to court. After another year and another trial the City *agreed* to an order allowing the docks to be built. This order required the City to provide any written assurances required by the Corps of Engineers. Instead, the City wrote the Corps of Engineers demanding that the dock permit be *denied*. While this issue was being fought, the City again revoked the building permit claiming insufficient work was being done. The parties went back to court and the City manager commanded no work be done on the property until an appeal to the fourth District or any subsequent appeal to the Supreme Court was decided.

Once again Yardarm won all the court battles and on July 16, 1981, three years after the second unlawful revocation, the permit was reissued for a third time. Due

to unprecedented inflation and increases in building costs during 1978-1981 the cost of the project quadrupled forcing Yardarm to reorganize the project and seek outside financing.

From 1981-1985 Yardarm's plan was to do as much work as possible to keep its permit alive while seeking permanent financing. (The trial court specifically found that Yardarm's inability to secure permanent financing during this period was a direct result of the City's hostilities). Nevertheless, on May 1, 1985, the City again deemed work progress insufficient and, once again, revoked the building permit. The letter of revocation gave Yardarm until October 30, 1985 (180 days) to refile its plans. Yardarm refiled it [sic] plans on time but the City ignored them, and tried to change the existing zoning for the project. Finally defeated, Yardarm suffered a foreclosure and bankruptcy.

On September 15, 1987 Yardarm Restaurant, Inc. sued Pompano alleging, *inter alia*, inverse condemnation. A bifurcated trial on the inverse condemnation claim (liability only) lasted 11 days and produced a transcript of 2,567 pages and a record of 3,859 pages. The trial court wrote a 21 page opinion (App.A) condemning the City's actions and finding a permanent taking. The date of taking was held to be October 30, 1985, the date the City's third permit revocation became final.

The City appealed to the Fourth District Court of Appeals. Eighteen months after briefing and oral argument were completed this Court reassigned the case to the Fifth District, which requested supplemental briefs and further oral arguments. On September 9, 1994, nearly three years after the trial court opinion, the Fifth District reversed the trial court holding that due to an alleged change in the law during the pendency of the appeal there was no "taking," and that the statute of limitations had run. (App.B) There are conspicuous differences between the facts recounted by the District

Court and those found in the opinion written by the trial judge. Nevertheless, even the appellate opinion does not dispute the following facts.

Pompano has never attempted to justify its interference as promoting the health, safety or welfare of its citizens. As a result of this interference Yardarm endured zoning battles, new density restrictions, new setback requirements, building moratoriums, five reviews by the City's building department, three trips to the Broward County Board of Rules and Appeals, a hearing before the Corps of Engineers, three permit revocations, seven Circuit Court cases and four trips to the Fourth District Court of Appeals. In reliance on its court ordered rights, Yardarm tore down its restaurant and spent millions of dollars to build the project. As the appellate opinion notes:

> Here, the lower court determined that the City's actions were "illegal" "arbitrary and capricious," "not taken to promote the public's health, safety or welfare," "frivolous," "dilatory," and a "usurpation of authority."

(App.B at 14).

The record below contains substantial competent evidence as to why the hotel project was the "only economically viable" use of the property. (See e.g. App. C) Pompano never introduced any evidence that any other use of the property would be "economically viable." However, the District court apparently agreed with Pompano's argument that the property could be used as a restaurant site or a site to build a 10 story building simply because the zoning laws allow such alternative uses. At no time does the court ever address the substantial evidence that, under the circumstances, no other project was "economically viable." See e.g. App. B. at 16.

Finally, the District Court also found no taking based on Yardarm's estimate that its property rose in value

from $5 million in 1981 to $6.2 million in 1985, and its alleged rejection of an $8 million offer for the property in 1983. *Id.* at 19. Assuming this is true, the opinion below fails to explain why this highly sought after property attracted only 1 bidder at auction just 3 years later. The sole bidder, the City of Pompano, managed to purchase this $8 million property for only $3.75 million.

## SUMMARY OF ARGUMENT

Jurisdiction is mandated, because the decision below conflicts with the decisions of other districts and this Court on the following points of law and expressly construes Article X, Section 6, of the Florida Constitution. Specifically, conflict is created by the decision's failure to apply: the *Graham* factors; the extent of the governmental interference; deprivation of "economically viable use;" and, the substantial competent evidence developed in the record below, to its analysis of whether a permanent taking occurred. Further, the decision finds that the statute of limitations expired before the inverse condemnation action became ripe. Finally, by precedent of this Court the decision expressly construes the Florida Constitution.

## ARGUMENT

### I.) CONFLICT FROM REVERSAL OF PERMANENT TAKING

The panel opinion notes the trial court's finding that "Yardarm in fact was denied all use of its property," (App.B at 12) but somehow reversed the finding of a permanent taking by concluding that there was no "deprivation of substantially all economic, beneficial or productive use of the property," App.B at 14. The panel could not reverse this finding without inappropriately reweighing the evidence and disturbing the presumed correctness of the lower court's determination which was supported by substantial competent evidence.

*Department of Agriculture v. Polk*, 568 So.2d 35 (Fla. 1990).

The test used above by the District Court is not exclusive.[1] The failure to apply other tests directly and expressly conflicts with *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994) (" '[T]he appropriate inquiry is directed to the extent of interference or deprivation of economic use'.") (citing *Joint Ventures, Inc. v. DOT*, 563 So.2d 622 (Fla. 1990)[2]; *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981), which has been neither overruled nor questioned [3]; *Vatalaro v. DER*, 601 So.2d 1223, 1229 (Fla. 5th DCA 1992) ("[W]here the owner is left with no viable economic use of the land, a taking has occurred."); *DOT v. Weisenfeld*, 617 So.2d 1071, 1073 (Fla. 5th DCA 1993) ("Our inquiry, then must be directed to the *extent* of the interference or deprivation of Weisenfeld's economic use of his property."); *Tinnerman v. Palm Beach County*, 19 Fla. L.Weekly D1826, 1827 (Fla. 4th DCA August 31, 1994) ("A taking occurs when the property owner is deprived of all economically viable use of the land.")[4]

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[1] If anything, this test appears to apply to temporary instead of permanent takings. The test for temporary takings should be more stringent since an owner keeps his land and gets damages.

[2] As per *A.G.W.S.*, Yardarm successfully challenged the illegitimate governmental acts. But, that was not enough. The evidence at trial showed that Pompano nevertheless proceeded on a course of interference that went "too far" and amounted to a permanent taking. Yet, on appeal it was held that Florida has no legal remedy at all.

[3] *Alexander v. Town of Jupiter*, 640 So.2d 79, (Fla. 4th DCA 1994) ("The extent of appellant's reasonable investment-backed expectation is one of the factors to be considered by the court in conducting a takings analysis, *see Graham* . . . ").

[4] Although the decision being appealed is from the 4th DCA, it was assigned to the 5th DCA to sit by designation. To the extent that conflict with the 4th DCA qualifies as an interdistrict one, citation to relevant 4th DCA cases as a source of conflict is made.

The panel below mentions the "economic viability" test without applying it. The decision ignored the substantial, competent evidence establishing the hotel project as the only "economically viable" use of the Yardarm property in that no other zoned use would allow Yardarm to recoup their investment, let alone *Graham* style investment backed expectations.

The finding of no permanent taking based on the land itself retaining value conflicts with the *Vatalaro* holding:

> It cannot be concluded that a permit denial has not resulted in a taking merely on the basis that the property continues to exist in the state in which it was acquired. Certainly the land is physically unchanged by a permit denial, yet the bundle of rights the owner had has been diminished. The owner no longer has the right to own and enjoy the property as he intended *** [where] the land is purchased with future development legitimately anticipated and with no existing bar thereto.

601 So.2d at 1228-29 (footnote omitted). The test is not whether the land retains value but whether "economically viable" use is deprived under the factual circumstances. If this "land retaining value" analysis is now relevant, remand to the trial court for fact finding is warranted.

## II.) STATUTE OF LIMITATIONS CONFLICT

Instead of holding that Yardarm's inverse condemnation claim began to run on October 30, 1985 (when its permit revocation became *final*), the District Court started the limitations clock on July 16, 1981 (when its permit was reissued for the second time). Thus, it found the limitations period ran in July of 1985, 3 months before the final permit revocation.

Such decision expressly and directly conflicts with *Key Haven Associated Enterprises, Inc. v. Board of Trustees*

*of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982); *Albrecht v. State*, 444 So.2d 8, 12-13 (Fla. 1984) ("The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists."); *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla. 1st DCA 1990) ("A taking could not have occurred in 1972, because appellees . . . did not have the right to bring an action for inverse condemnation until 1983, when the Corps did finally deny their permit."); *Glisson v. Alachua County*, 558 So.2d 1030, 1035-36 (Fla. 1st DCA 1990) ("['A]n essential prerequisite to a taking claim is a final decision by the government as to what use of the property will be allowed.' "); *Sarasota County v. Ex*, 19 Fla.L.Weekly D1687 (Fla. 2d DCA August 3, 1994) (suggesting a 7 year statute of limitations for inverse condemnation claims when land not deeded to government by landowner); *Vatalaro*, 601 So.2d at 1229 ("We hold that no taking occurred until DER denied Vatalaro's permit application . . . "); *Tinnerman*, 19 Fla.L. Weekly at D1826-27 ("A [takings] claim is not ripe until the government . . . has made a final decision regarding the application of the regulation to the property ***[R]ipeness requirement of a 'final decision' enables a Court to determine whether a taking has occurred and, if so, its extent.") Certainly, if the takings claim lacks ripeness, then the statute of limitations cannot have run. Yet the lower court somehow said it was so.

The decision below rationalizes its failure to apply *Key Haven* and *Albrecht* by stating, "Ripeness does not require Yardarm to engage in years of litigation with the City." App.B at 19. True, *Key Haven*, *Albrecht* and its progeny do not *require* such a challenge. But, they *allow* the challenge and toll the ripeness of a *permanent* taking claim until a *final* determination is made regarding the status of the property at issue.

The panel decision blames Yardarm for not bringing a temporary taking claim. App. B at 20. Left unsaid is that

Yardarm had no choice but to keep challenging the City's unwarranted permit revocations until a permanent taking accrued. Temporary takings damages did not surface until 1987. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (U.S. 1987), was decided two years *after* the decision below already time barred this action for permanent taking. Moreover, even if temporary taking damages had been available, the litigants, not the Courts, elect their remedies. However, the decision below suggests that forgoing relief for a *temporary* taking precludes a *permanent* taking.

Thus, the panel decision requires a developer to sue the government immediately whenever it is even arguably wrong. As such an owner must sue prior to determining whether or not damage has been caused in direct conflict with *A.G.W.S*, 640 So.2d at 54 (no compensation for taking absent showing of actual damage to owner). Essentially, the opinion below finds Yardarm stupidly continued to fight the City's illegal activities when it should have known it was beaten, dropped everything and sued for damages. Thus, if this opinion stands, a property owner not only can, but *must*, sue a governmental entity without even trying to mitigate the damages caused by its interference.

### III. THE DECISION BELOW EXPRESSLY CONSTRUED ARTICLE X, SECTION 6 OF THE FLORIDA CONSTITUTION.

In *Key Haven*, 427 So.2d at 154-55, this Court reviewed a district court's decision that a judicial action for inverse condemnation, based on DER's denial of a dredge-and-fill permit, cannot be brought until all remedies under Fla. Stat. Chapter 120 have been exhausted. This Court held that this type of decision expressly construes Article X, Section 6, of the Florida Constitution thereby conferring jurisdiction in this Court.

The finding below that Florida law does not provide a remedy for the City's illegal conduct and that a landowner must bring a condemnation action before it is ripe likewise expressly construes Article X, Section 6, of the Florida Constitution and, thus, requires review by this Court under the *Key Haven* rationale.

## CONCLUSION

For the reasons stated, we respectfully request that this Court take jurisdiction of this matter.

Respectfully submitted,

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By: /s/ Gale Ciceric Payne
Gale Ciceric Payne

By: /s/ James C. Pilkey
James C. Pilkey

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was hand-delivered to Henry Latimer, Esquire, Counsel for Respondent, at his office located at ECKERT, SEAMANS, CHERIN & MELLOTT, 100 N.E. Third Avenue, Suite 900, Fort Lauderdale, Florida 33301, this 20th day of October, 1994.

/s/ Gale Ciceric Payne
Of Counsel

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

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**CASE NO. 87-25021**

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YARDARM RESTAURANT, INC., a Florida Corporation, JAMES T. STEPHANIS and THOMAS J. STEPHANIS, individually,

Plaintiff,

vs.

CITY OF POMPANO BEACH, a Florida municipal corporation,

Defendant.

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**COMPLAINT**

[A TRUE COPY, ROBERT E. LOCKWOOD (stamp)]

YARDARM RESTAURANT, INC., a Florida corporation, JAMES T. STEPHANIS and THOMAS J. STEPHANIS, through undersigned counsel, bring this suit to recover just compensation for the taking its real property and damages for depriving it of rights secured by the Constitution and laws of the United States against the Defendant, CITY OF POMPANO BEACH, a Florida municipal corporation, and alleges as follows:

1. This suit is brought pursuant to Rule 1.110, et seq., Florida Rules of Civil Procedure, and under authority of the Fifth and Fourteenth Amendments of the Constitu-

tion of the United States of America, Article I, Section 9, of the Constitution of the State of Flolrida, [sic] and Title 42, Section 1983 of the United States Code. The amount involved exceeds $5,000.00.

2. Plaintiff, YARDARM RESTAURANT, INC., is a Florida corporation and is the owner of real property located in Broward County Florida; Plaintiff, JAMES T. STEPHANIS, is a citizen and resident of Florida and is a founder and 50% owner of Plaintiff, YARDARM RESTAURANT, INC.; Plaintiff, THOMAS J. STEPHANIS, is a citizen and resident of Florida and is a founder and 50% owner of Plaintiff, YARDARM RESTAURANT, INC (hereinafter "YARDARM").

3. Defendant, CITY OF POMPANO BEACH (hereinafter "CITY"), is a Florida municipal corporation organized and existing under the laws of the State of Florida and located in Broward County, Florida.

4. YARDARM is entitled to relief from the Defendant CITY upon the following facts:

(A) In 1973, YARDARM made inquiry of the CITY about its zoning laws concerning height limitation of buildings and made known to the CITY, through its officials, its intent to make application to build an 18 story hotel on its real property located in Broward County, Florida, within the city limits of the Defendant CITY. At the time of YARDARM's first inquiry, they were advised that the height limits for buildings in the CITY were unlimited by the ordinances and laws of the CITY and there were no plans in progress to change them. Before YARDARM could perfect its application for a permit to build its 18 story building, the CITY advertised and passed an Ordinance limiting all buildings in the CITY to a height of 10 stories. [A copy of Ordinance No. 73-40 is attached hereto and marked EXHIBIT NO. 1.]

(B) YARDARM then made application to the CITY for a special exception use of its property pursuant to the

CITY's ordinances and regulations. After vigorous opposition by citizens groups and several of the Commissioners themselves, as well as officers and employees, the CITY granted the special exception use on the 10th day of October, 1983, allowing YARDARM to build its proposed 18 story hotel. [A copy of Ordinance No. 73-96 is attached hereto and marked EXHIBIT NO. 2.]

(C) On or about February 8, 1974, YARDARM presented its completed plans to the CITY for approval and sought a permit to build. On February 14, 1974, the plans were approved and the permit was issued by the Building Official of the City. On or about February 18, 1974 (or four days later), the Permit was revoked by the Building Official upon the direct order of the City Manager.

(D) Desperate attempts were made by YARDARM to satisfy the many post permit objections by the CITY to the plans submitted by YARDARM. The CITY would not be satisfied and failed to reissue the permit. For the following four months, CITY officers and representatives drew up list after list of objections to YARDARM's plans. When it became obvious that the CITY, through its officers and employees, had no intention to reissue the permit to build the hotel, YARDARM filed suit for declaratory decree in the Circuit Court of Broward County in June 1974.

(E) During preparation for trial during 1974-75, the CITY filed its motion for summary judgment. The trial court denied the motion and the CITY filed its notice of interlocutory appeal on August 4, 1975. On April 15, 1976, the Fourth District Court of Appeal affirmed the lower court's denial of the CITY's motion. But, by their unwarranted appeal, the CITY had delayed the trial for more than two years. [A copy of the Opinion of the Fourth District Court of Appeal dated April 15, 1976 is attached hereto and marked EXHIBIT NO. 3.]

(F) On September 26, 1976, after trial of the cause was had, final judgment was entered ordering the CITY to reissue the Permit. In its order declaring that the CITY reissue the permit, one of the findings of the court was that there was ". . . a showing of an obvious desire by the City to oppose the granting of a building permit to the Plaintiff." [A copy of the Final Judgment dated September 27, 1976 is attached hereto as EXHIBIT NO. 4.]

(G) Pursuant to the final judgment entered on September 26, 1976, YARDARM resubmitted its plans and continued its effort to have its permit reissued. The CITY denied all such requests, contending now that the Plans did not comply with the City parking ordinances. On February 14, 1977, Plaintiff filed yet another petition seeking the assistance of the Court on the issue of the parking ordinances. After a full trial, the court entered its order on March 24, 1977, ordering the CITY to grant the permit concerning parking in accordance with YARDARM's plans, holding the CITY's objections to be without merit. [A copy of the Order dated March 14, 1977 is attached hereto and marked EXHIBIT NO. 5.]

(H) YARDARM then applied for a permit to build its docks and boat slips in accordance with CITY ordinances but the CITY denied such permit. On January 30, 1978, YARDARM yet again was driven to the courts for relief and petitioned the court for supplemental relief for the issuance of a dock permit. On December 14, 1978, after another full trial, the court entered its order approving the stipulation by the Plaintiff and the City granting issuance of the dock permit on terms suggested by the court. Thus another year had been lost. [A copy of the Order dated December 14, 1978, is attached hereto and marked EXHIBIT NO. 6.]

(I) Demonstrating the CITY's continuing opposition, even after the Court entered its order upon the joint stipulation at trial concerning issuance of the dock

permit in 1978, when members of the public opposing the YARDARM project persuaded the Corps of Engineers to hold a public hearing concerning the legality of the permit for the dock, the City Manager himself, one John Schoeberlein, took a public position in opposition to the issuance by the Corps of Engineers of the dock permit, notwithstanding the stipulation by his employer, CITY, which was incorporated by the court in its order. [See letter by Schoeberlein dated May 15, 1979 attached hereto and marked EXHIBIT NO. 7.]

(J) On the 10th day of August, 1978, the CITY fired its Building Official, one Walter Williams, because he refused once again to revoke YARDARM's permit when he was ordered by the CITY to do so. The Building Official appealed his firing to the Board of Rules and Appeals, a body having jurisdiction to review such matters, and, after a full hearing, the Board of Rules and Appeals, by unanimous decision, ordered the CITY to reinstate the Building official. Thus was YARDARM's permit saved once again.

(K) On the 10th day of July, 1979, upon the order of the CITY through its City Manager, the Building Official once again did revoke the Permit. YARDARM appealed the revocation to the Board of Rules and Appeals which had jurisdiction of such matters. The said Board, after full and thorough hearing and by unanimous decision, upheld YARDARM's claim that the revocation was without cause and wrongfully and unlawfully done. [A copy of an excerpt from the September 13, 1979 meeting of the Broward County Board of Rules and Appeals is attached hereto and marked EXHIBIT NO. 8.]

(L) The CITY appealed the decision of the Board of Rules and Appeals restoring YARDARM's permit to the Circuit Court pursuant to the Rules governing such actions. The Circuit Court, after full hearing, affirmed the decision of the Board of Rules and Appeals on

December 21, 1979. [A copy of that Final Judgment is attached hereto and marked EXHIBIT NO. 9.]

(M) The CITY filed its notice of appeal from the order of the Circuit Court to the Fourth District Court of Appeal for a Writ of Certiorari on January 18, 1980. On July 1, 1981, the Fourth District Court of Appeals entered its judgment denying the Writ of Certiorari. Thus, the CITY had delayed the building by revoking and withholding YARDARM's permit for another two years and Plaintiff, YARDARM, alleges that it was done once again wrongfully, in bad faith, and without just cause, inasmuch as the Board or Rules and Appeals, the Circuit Court, and the Fourth District Court of Appeal had found the CITY's actions in revoking the permit two years earlier, i.e., July 10, 1979, to be wholly without merit. But, it had cost YARDARM another two years in building its hotel. [A copy of the July 1, 1981 Opinion of the Fourth District Court of Appeal is attached hereto and marked EXHIBIT NO. 10.]

(N) Thereafter the CITY reissued the permit. Due to the constant litigation over the previous seven years, YARDARM had been unable to finalize financing from numerous banks, lending institutions and private individuals and organizations because of the instability and uncertainty of its permit due to the litigation since 1974 and the constant, unrelenting and implacable opposition and harassment of the CITY to the building of the YARDARM hotel. Financial commitments in place in 1974 when the permit was first issued had vanished in whole or in part due to the continued opposition of the CITY. Not being able to finalize its full financing in order to protect its right to build a hotel upon its real property, YARDARM was forced to borrow money and mortgage its property on short term loans in order to keep some work in progress to comply with the CITY's rules pending permanent financing. YARDARM expended large sums of money for architects fees, legal fees, driving expensive

pilings, and other expenses to keep its permit alive. The CITY's harassing opposition and litigation permeated all of YARDARM's attempts to procure financing and raise the hotel from its foundation. CITY officials were always poised to revoke the permit upon any excuse. YARDARM spent large sums to keep some work in progress after 1981. The CITY finally revoked the permit once more in 1985 for failure to prosecute the work. [A copy of the CITY's letter dated July 10, 1985 to Plaintiff is attached hereto and marked EXHIBIT NO. 11.]

(O) YARDARM's inability to build or to meet its mortgage commitments on the short term loans it had been forced to enter into resulted in a suit of foreclosure on May 8, 1985 by Sunrise Savings & Loan Association, the lender who held the mortgage. Shortly thereafter, YARDARM was forced to seek the protection of the Federal Bankruptcy Court by the filing of a Chapter 11 proceeding on March 20, 1986.

(P) In October, 1985, the CITY, seeing the YARDARM prostrate and helpless, decided to repeal Ordinance No. 73-96, the special exception it had granted YARDARM in 1973 to build an 18 story hotel. The CITY published notice of the proposed repeal of the ordinance but did not give direct notice of the proposed repealing ordinance to YARDARM. YARDARM noticed the newspaper account of the proposed repeal of its special exception use (Ordinance No. 73-96) and once again sought the help of the Circuit Court to protect its special exception use. On November 20, 1985, the Circuit Court entered its order enjoining the CITY from repealing the special exception use granted by the CITY in 1973. [A copy of the Petition for Injunction and Order is attached hereto and marked COMPOSITE EXHIBIT NO. 12.]

(Q) On December 19, 1985, the CITY filed its notice of appeal of the Circuit Court Order enjoining the CITY from repealing the special exception use. The appeal to

the Fourth District Court of Appeal resulted in a decision for the CITY, the court holding that the injunction against an administrative act was improvidently granted.

(R) From the adoption of ordinance No. 73-40 in 1973 restricting all building in the CITY to 10 stories and the special exception granted in 1973 to YARDARM, the CITY has pursued its unusual, implacable, spiteful opposition to the building of Plaintiff's hotel as a policy of the CITY. Time and time again, from 1973 to the present time, the CITY has committed official acts by and through its officers and employees claiming violation of its ordinances and regulations and causing and pursuing litigation that cost YARDARM opportunity to procure construction financing and deprived it of all use of its property. On countless occasions since 1974 to the present, YARDARM has been forced to ask the protection of the courts to enforce its rights under the CITY's laws and ordinances in attempts to make lawful use of its property. On each occasion, YARDARM was successful in the court's [sic] against the CITY. On every occasion that YARDARM sought protection by the courts, the courts and appellate bodies held that the CITY's actions had been without merit. The instability and uncertainty caused by the litigation described herein permeated all of YARDARM's negotiations with lenders. The constant opposition of the CITY directly and proximately caused YARDARM not to be able to arrange permanent construction financing.

(S) The price of building the hotel has escalated from approximately Six Million Dollars in 1974 to over Twenty-Nine Million Dollars in 1987. The great financial burden in fighting the CITY during the past 12 years has brought YARDARM to the brink of losing its property in bankruptcy and foreclosure. Thus, the CITY has not only deprived YARDARM of all use of its real property for approximately 12 years, but now, at the last, will cause YARDARM to lose its property altogether as direct and

proximate result of the wrongful, unfair and bad faith conduct of the CITY through its wrongful official acts.

**COUNT 1**

**(FOR JUST COMPENSATION FOR DEPRIVATION OF THE USE AND TAKING OF ITS PROPERTY PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, FLORIDA CONSTITUTION)**

5. Plaintiffs reallege all of the allegations contained in paragraphs 1 through 4 (A) through (S) above.

6. Plaintiffs allege that the constant, relentless, implacable opposition of the CITY as alleged above has prevented Plaintiffs from building its hotel. By its acts of baseless claims of zoning or building code violations, Defendant has caused countless legal proceedings over the past 12 years, as alleged above. These acts have caused delays, impuned the legal status of Plaintiffs' building permit and they have frustrated Plaintiffs' efforts to get financing for its proposed hotel. The constant opposition and resulting litigation without just cause has successfully prevented Plaintiff from the lawful use of its property pursuant to their rights under the United States and Florida Constitutions, the laws of the United States and the laws of the Defendant CITY. The numerous acts of the CITY described above were committed in bad faith without good cause. Defendant, without Plaintiffs being granted their rights of due process, yielded to the demands of citizens groups who opposed the hotel. It tolerated and supported the unjustified opposition by various officials of the CITY. All of these acts, and others not enumerated, have resulted in depriving YARDARM of all use of its property and drove it into bankruptcy which has or will result in the total loss of its property.

7. Plaintiffs allege that they are entitled to full compensation for the loss of use of their property since

1974 to the present time and to full compensation for the total loss of the property itself under the Fifth Amendment of the Constitution of the United States, the Constitution of the State of Florida, the laws of the United States and, specifically, under the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States as articulated in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* decided June 9, 1987, by the Supreme Court of the United States.

WHEREFORE, YARDARM demands judgment:

(1) For just compensation for depriving YARDARM of all use of its property from 1974 to the present time in an amount in excess of Thirty-Five Million Dollars.

(2) For just compensation for the final total loss of its property under bankruptcy and foreclosure due to the acts of the CITY enumerated herein in an amount in excess of One Hundred Million Dollars.

(3) For reasonable attorneys fees.

(4) Such other and further relief as may seem proper.

(5) Plaintiffs demand a trial by jury of all issues triable by a jury.

**COUNT II**

**FOR RELIEF UNDER TITLE 42 OF THE UNITED STATES CODE, SECTION 1983**

8. Plaintiffs reallege all of the allegations contained in paragraphs 1 through 7 above.

9. YARDARM claims damages against the CITY under Title 42 of the United States Code, Section 1982. That Act provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

10. Plaintiffs allege that the CITY, acting under color of authority, has deprived the Plaintiff of the use of its property guaranteed by the Constitutions of this State and of the United States as alleged in paragraphs 4 (A) through (S) above.

11. YARDARM alleges that the acts of the CITY enumerated herein were malicious and in bad faith; that such acts were committed without probable cause to believe that the CITY's acts in opposition were legally valid and that YARDARM was not entitled to the matters and things claimed as alleged above, because in all but the appeal of the order enjoining repeal of the special exception use, the appellate boards, trial courts and appellate courts of the State of Florida have overruled the CITY and ruled in YARDARM's favor.

12. That as a direct and proximate result of the CITY's acts as alleged herein, the CITY has, under color of the laws, ordinances and regulations of the CITY, wrongfully deprived YARDARM of ". . . rights, privileges, or immunities secured by the Constitution and laws . . .", to-wit: all use of its property for 13 years and caused the total loss of its property in foreclosure and bankruptcy. Such rights and privileges to the enjoyment of its property is secured by the Constitution and Laws of the United States, all as provided by Title 42 United States Code.

WHEREFORE, YARDARM demands judgment:

(1) For damages for the deprivation and loss of all use of its property from 1974 to 1987 contrary to the law of the United States in an amount in excess of Thirty-Five Million Dollars.

(2) For damages for the total loss of its property by mortgage foreclosure and final taking of its property in an amount in excess of One Hundred Million Dollars.

(3) For reasonable attorneys fees.

(4) Such other and further relief as may seem proper.

(5) Plaintiffs demand a trial by jury of all issues triable by a jury.

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By /s/ Earl Faircloth
Earl Faircloth
Florida Bar #023501

BEST AVAILABLE COPY

## EXAMPLES OF USES ALLOWED IN DISTRICTS B-3 AND B-5 (PRIOR TO 8-13-74)

### EAST PROPERTY

B-3

PERMITTED USES

1. All residential uses; B-1 and B-2 uses except single family homes.
2. Agencies, including employment, new car agency, automobile rental and leasing.
3. Appliance, radio and television sales and repair.
4. Auction enterprise.
5. Bars.
6. Bicycle sales and repair.
7. Blueprinting, photostating.
8. Business and commercial colleges.
9. Dry cleaning, carpet, rug or bag cleaning and hand laundries employing five (5) persons or less.
10. Enameling, japanning, or lacquering hand brush applied or by dipping in tanks not over five (5) cubic feet capacity.
11. Express company.
12. Filling stations (for automotive vehicular service) subject to 750 foot distance between stations.
13. Grocery, market, bakery and similar enterprises, retail only.
14. Hospitals and clinics (not veterinary).
15. Hotels, motels and apartments.
16. Ice pick-up station, self-service and automatic laundry, personal service shops.
17. Job printing.
18. Moving picture houses, theatres, auditoriums, billiard or pool parlors.
19. Newspaper business and administrative offices.
20. Restaurants (Not drive-ins).
21. Small parts stores.
22. Stationery and office equipment.
23. Stone or monument display and retail sales only.
24. Studios.
25. Transportation passenger stations, terminals and depots.

B-5

PERMITTED USES

1. All B-3 uses.
2. Boats for hire or charter with approved docking facilities and including commercial fishing.
3. All similar uses and structures and uses.

EXHIBIT ____
YARDARM LAND

- B-1 - "Resort Retail"
- B-2 - "Neighborhood Retail"
- B-3 - "Central Retail"
- B-5 - "Commercial Business"

## EXAMPLES OF USES ALLOWED IN DISTRICT B-2 (AFTER 8-13-74)

### WEST PROPERTY

B-2

PERMITTED USES

1. Supermarket, hardware, variety, gift, florist, jewel wearing apparel, fabrics, drugs, books, bakery, and simi retail enterprises.
2. Filling stations for automotive type vehicles but not connection with auto repairs garages; water front or mar filling stations subject to 750 foot distance betw stations.
3. Self service and automatic laundry, dry cleaning and laun pick-up and delivery, ice pick-up and similar serv establishments.
4. Personal service shops such as barber, beauty parlor, s shine and shoe repair.
5. Post office substation.
6. BOAT LAUNCHING
   Boat launching and docking. Boat launching and dock permitted for hire, for sale, resale, warranty maintena service, and recreational purposes only; boats for hire charter with approved docking facilities and includ commercial fishing permitted; launching or docking for rep or overhaul not permitted. ('58 code, S 50.177) (Ord. 74- passed 11-27-73; Am. Ord. 74-69, passed 8-13-74)
7. All permitted zoning uses in district B-1 can be used in zoning district B-2.

☑ B-1 USES

a. Residential uses except single-family and duplex.
b. Agencies such as insurance, real estate, travel and employment.
c. Appliance, radio and television sales, and retail showrooms.
d. Banks and similar financial institutions.
e. Department store.
f. Restaurants.
g. Motels, hotels.
h. Music stores, photo shops, art galleries.
i. Office buildings.
j. Package stores for sale of alcoholic beverages.
k. Private and public utility offices.
l. Telephone, telegraph.
m. Bicycle sales.
n. Blueprinting.
o. Business and commercial colleges.
p. Hospitals and clinics.
q. Theaters and auditoriums.
r. Stationery and office equipment.
s. Funeral homes and mortuaries.
t. Open-air parking lots.
u. Child care center.
v. Multi-family residential in the same structure with a commercial use.

SOURCE OF INFORMATION DERIVED FROM: Chapter 155 "Zoning Code" City of Pompano Beach Florida Code of Ordinances and City of Pompano Beach Florida ordinance number 664 official zoning ordinance.

CITY OF POMPANO BEACH
BROWARD COUNTY, FLORIDA

I HEREBY CERTIFY that the foregoing is a true and correct copy of Excerpts from Ch. 155 of the Zoning Code as filed in my office. Building Dept

WITNESS my hand and Official Seal in the City OF POMPANO BEACH, FLORIDA this 19th day of February A.D. 19 91

Deputy City Clerk

Mary Kestcher